UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO MURGUIA, Petitioner, v. DERRICK L. OLLISON, Respondent.	NO. CV 06-5087-ODW(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 6, 2008.

OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO MURGUIA, Petitioner, v. DERRICK L. OLLISON, Respondent.	NO. CV 06-5087-ODW(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Otis D. Wright, II, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on August 14, 2006 (the "Petition"). On September 8, 2006, Respondent filed an Answer which did not address the merits, but rather argued that the Petition should be dismissed

for failure to exhaust, given Petitioner's then-pending habeas petition before the California Supreme Court. When Petitioner failed to file a timely reply to Respondent's Answer, the Magistrate Judge filed a Report and Recommendation recommending that the Petition be dismissed due to Petitioner's failure to prosecute. See November 13, 2006 Report and Recommendation of United States Magistrate Judge.

On November 29, 2006, Petitioner filed a "Motion: For Stay and Abeyance" (the "Motion") requesting that the Court stay the proceedings while Petitioner exhausts his claims. The Magistrate Judge then withdrew the Report and Recommendation, see November 29, 2006 Minute Order, and the Court subsequently denied the Motion. See January 24, 2007 Order.

On March 12, 2007, Respondent filed a Notice of Lodging indicating that the California Supreme Court denied Petitioner's habeas petition on January 24, 2007. See Notice of Lodging, fn. 1, pp. 1-2; Respondent's Lodgment 5. The Court then issued an order requiring Respondent to file a Supplemental Answer addressing the merits of the Petition. See April 23, 2007 Minute Order. Respondent filed a Supplemental Answer on September 5, 2007. Petitioner filed a Reply on November 13, 2007.

BACKGROUND

A jury found Petitioner guilty of one count of second degree robbery in violation of California Penal Code section 211 (Reporter's Transcript ["R.T."] 386-87; Clerk's Transcript ["C.T."] 63). The jury

found true the allegation that, in the commission of the offense, Petitioner personally used a firearm within the meaning of California Penal Code section 12022.53(b) (R.T. 386; C.T. 63). The court sentenced Petitioner to a prison term of thirteen years (R.T. 390; C.T. 74-77).

Appellate counsel for Petitioner filed a brief pursuant to People v. Wende, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979), raising no issues but requesting that the California Court of Appeal independently review the record. See Exhibit B to Answer. Petitioner filed a handwritten supplemental brief asserting certain of the issues herein. See Exhibit A to Supplemental Answer. On February 24, 2005, the Court of Appeal dismissed the appeal on the grounds that Petitioner's counsel had complied with her duties under People v. Wende, and finding that no arguable issues existed. See Exhibit C to Answer. The California Supreme Court denied Petitioner's petition for review without comment on May 11, 2005. See Exhibit D to Answer; Respondent's Lodgment 3.

Petitioner then filed a habeas corpus petition with the California Supreme Court which that court denied, citing In re Swain, 34 Cal. 2d 300, 304, 209 P. 2d 793 (1949), cert. denied, 338 U.S. 944 (1950) ("Swain") and People v. Duvall, 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259, 886 P.2d 1252 (1995) ("Duvall"). See Respondent's Lodgments 4 and 5.

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PETITIONER'S CONTENTIONS

Petitioner challenges the constitutionality of his conviction, arguing:

1. Petitioner's counsel assertedly rendered ineffective assistance by allegedly:

a. Failing to investigate the whereabouts of the bicycle that Petitioner was riding when he was arrested;

b. Failing to "mak[e] critical objections at a critical stage in trial" (Petition, Ground 1).

2. Petitioner allegedly was denied his due process right to a fair trial by:

a. the loss of the bicycle which Petitioner alleges deprived him of the right effectively to cross-examine witnesses (Petition, Grounds 1 and 3); and

b. the admission of identification evidence allegedly tainted by assertedly suggestive identification procedures (Petition, Grounds 2 and 3).

SUMMARY OF TRIAL EVIDENCE

At trial, the prosecution introduced evidence to show the

following:

In the early morning hours of June 8, 2003, Pedro Duran was robbed at gunpoint as he returned to his Huntington Park apartment (R.T. 302-03, 305, 314). Duran had just parked his truck in his garage when he noticed someone standing next to a nearby trash can with a gray, white and chrome bicycle (R.T. 302-03, 316). Duran had never seen the man before (R.T. 315).

Duran testified that after he got out of his truck he watched as the man walked toward him to a distance of about three or four meters away (R.T. 304). Duran was able to see the man's face (Id.). Duran said the man asked Duran if he had a bicycle pump because the man's bike tire had gone flat (Id.). When Duran said he did not, the man walked in front of Duran and pulled out a gun from his waistband and put it to Duran's forehead (R.T. 305). The man demanded all the money that Duran had with him (Id.).

The man then directed Duran to a darker place in the garage and told him to lie on the ground (R.T. 306, 317-18). Duran complied (Id.). The man took Duran's wallet and pulled a chain off Duran's neck (R.T. 307). The man told Duran not to look up and told Duran to count to 18 (Id.). The man left on his bicycle (R.T. 307-08). As the man was leaving, Duran turned to look, but the man told Duran not to look or Duran would be shot (Id.).

Duran called the police and described his assailant as a man between the ages of 20 and 25, who was approximately two inches taller

than Duran and weighed between 180 and 190 pounds (R.T. 308-09, 319). Duran weighed 176 or 177 pounds at the time of the robbery (R.T. 319). The assailant spoke to Duran both in English and in Spanish (R.T. 309).[1]

At trial, Duran identified Petitioner as the man who robbed him. See R.T. 303 (Duran indicating: "It looks like him."). The prosecution asked Duran and Petitioner to stand and then asked whether Duran was confident Petitioner was the man who robbed him (R.T. 310). Duran said "yes" (Id.). Duran had earlier identified Petitioner from a 6-pack photographic line-up on July 14, 2003, after admonishment by police (R.T. 310-12, 319, 332-33, 335).[2] Duran remarked on the back of the line-up: "I recognize the individual because before he attacked me, he had asked me for a bicycle pump" (R.T. 313).

Huntington Park Police Officer Conrad Chacon testified that he stopped Petitioner on June 20, 2003 for riding a chrome bicycle on the wrong side of the street (R.T. 21-22, 25). Upon the stop, Officer Chacon searched Petitioner and found a fully-loaded, semi-automatic .32-caliber handgun in Petitioner's waistband (R.T. 23-24). The gun was chrome with a black handle, "very rusted" and "very old" (R.T. 24). At trial, Duran identified a photograph of the gun police seized

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[1] Petitioner's father testified that Petitioner is 5'8" tall, weighed 180 pounds, and speaks both English and Spanish (R.T. 328-29).

[2] Police advised Duran in Spanish: (1) to look at the series of photographs to determine whether he could identify anyone as being involved in the robbery; (2) that it was not known if the person who robbed him was in the photographs; and (3) not to feel obligated to identify anyone (R.T. 311-12).

from Petitioner on June 20 as the gun that Petitioner pointed at Duran's forehead (R.T. 305-06).[3]

At the time of the robbery, Petitioner lived in the 6800 block of Marconi Street in Huntington Park, which is approximately four or five blocks away from where the robbery took place (R.T. 23-24). None of Duran's items were recovered from Petitioner (R.T. 26, 334).

Petitioner did not testify or present any witnesses in his defense. Rather, Petitioner's counsel attempted to attack the strength of the state's case (R.T. 380-81). Petitioner' counsel extensively cross-examined Duran concerning: (1) Duran's observation of the robber at the time of the robbery; (2) Duran's description of the robber shortly after the robbery; (3) Duran's later identification of Petitioner as the robber and of Petitioner's gun as the gun Duran's robber used; and (4) what the police said to Duran at the time of Duran's identifications (R.T. 318-24). Counsel argued that the evidence against Petitioner was weak, given Duran's limited ability to view the robber, the purported inaccuracy of his description of the robber on the night of the robbery, and the time that elapsed before the identifications (R.T. 372-78). Counsel suggested that the police tainted Duran's identifications by telling Duran that they had

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[3] Prior to trial, on November 4, 2003, police showed Duran a photograph of the gun police seized from Petitioner and Duran then identified the gun in the photograph as the gun Petitioner used to rob him (R.T. 306, 333, 336). Before viewing the photograph, Duran had described the gun to police as "old-looking" (R.T. 326).

arrested Petitioner with a bicycle and a gun (R.T. 372-73).[4]

STANDARD OF REVIEW

A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the

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[4] Counsel closed with:

> You can reasonably assume that when [the police] went to [Duran], they told [Duran], hey listen. We caught this guy four blocks from where you live, and he lives down the block. Hey, guess what. He was on a bike and he had a gun. We think he's the guy. What do you think. [sic] And they show [Duran] a photograph, and, sure enough, they put his photograph right dead-bang center number two position that when you look at the sixpack, you can't help but look at that photograph. ¶ The officer said it was by luck. I don't know. But I think it's too much of a coincidence that my client's picture ends up right in the center position, the first photograph the victim is going to look at.
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> * * *
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> Fastforward four and-a-half months later, the officer decides to put a picture of the gun and go and show it to the victim. Obviously, again, sometime, whether it was this meeting or the meeting before Mr. Duran was told you found this gentleman riding a bicycle matching a description of the person you described with a gun on him on a bicycle, here's the gun we found on him. Does it ring a bell. [sic] Yeah. Sure. That's the gun.

(R.T. 373-74). The trial court instructed the jury with CALJIC 2.92, the standard instruction for evaluating the reliability of eyewitness identifications (C.T. 47-48).

United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted) (quoting Williams v. Taylor, 529 U.S. at 405-06).

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent

to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520-21 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. (citation omitted); see also Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir.), cert. denied, 540 U.S. 968 (2003).

In applying these standards, this Court looks to the last reasoned state court decision. See Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (citation and quotations omitted). To the extent no such reasoned opinion exists, as where a state court rejected a claim in an unreasoned order, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). If a state court declined to decide a federal constitutional claim on the merits, this Court must consider that claim under a de novo standard of review rather than the more deferential "independent review" of unexplained decisions on the merits authorized by Delgado v. Lewis. See Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (standard of de novo review applicable to claim state court did not reach on the merits).

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DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed with prejudice.[5]

I. Petitioner Is Not Entitled to Habeas Relief on His Ineffective Assistance of Trial Counsel Claim.

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted). For purposes of habeas review under 28 U.S.C. section 2254(d), Strickland sets forth clearly established Federal law as determined by the United States Supreme Court. See Williams v. Taylor, 529 U.S. at 391

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[5] The Court has read, considered and rejected on the merits all of Petitioner's contentions. The Court discusses Petitioner's principal contentions herein.

(citation and quotations omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." Karis v. Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). The test is "only whether some reasonable lawyer . . . could have acted, in the circumstances, as defense counsel acted." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.) (citations and quotations omitted), rev'd on other grounds, 525 U.S. 141 (1998); see also Babbitt v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998), cert. denied, 525 U.S. 1159 (1999) (relevant inquiry under Strickland is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable) (citation and quotations omitted); Morris v. California, 966 F.2d 448, 456-57 (9th Cir.), cert. denied, 506 U.S. 831 (1992) (if the court can conceive of a reasonable tactical reason for counsel's action or inaction, the court need not determine the actual explanation). Petitioner bears the burden to "overcome the presumption that, under

the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (citation and quotations omitted).

B. Petitioner Has Not Shown His Counsel Was Ineffective.

Petitioner alleges his trial counsel was ineffective for failing to: (1) "investigate the whereabouts" of the bicycle Petitioner was riding when he was arrested; and (2) "[make] critical objections at a critical stage in trial" (Petition, Ground 1). The California Supreme Court rejected this claim without reaching the merits.[6] Therefore,

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[6] Respondent admits that the California Supreme Court's summary denial citing Swain and Duvall dismissed Petitioner's state habeas petition for failure to allege facts with sufficient particularity, and therefore this claim should be reviewed de novo. See Supplemental Answer, p. 6 (citing Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002), cert. denied, 539 U.S. 916 (2003) (holding that de novo review is appropriate when state court did not reach merits of claim properly preserved by petitioner and thereafter presented to federal habeas court)); see also Chaker v. Crogan, 428 F.3d 1215, 1220-21 (9th Cir. 2005), cert. denied, 126 S. Ct. 2023, 164 L. Ed. 2d 780 (2006) (noting that for procedurally defaulted claim where there is no state court decision on the merits, there is no decision to review under AEDPA and the standard of review is de novo); Medley v. Runnels, 506 F.3d 857, 869-70 (9th Cir. 2007) (en banc) (Ikuta, J., dissenting) (discussing Chaker). Respondent does not assert that Petitioner's ineffective assistance claim is unexhausted or procedurally defaulted. See Supplemental Answer, p. 2.

To resolve this claim, the Court need not decide whether the California Supreme Court's apparent failure to reach the merits on state procedural grounds procedurally defaulted this claim. See Lambrix v. Singletary, 520 U.S. 518, 523-25 (1997) (explaining that when habeas petition presents both question of procedural default and a merits issue, the procedural bar question should ordinarily be considered first; however, where (continued...)

the Court reviews this claim de novo. See Respondent's Lodgments 4 and 5; Lewis v. Mayle, supra, 391 F.3d at 996. For the reasons discussed below, neither of Petitioner's contentions merits relief.

1. Failure to Investigate the Bicycle

Duran described his assailant as having a gray, white and chrome bicycle with curved handles (R.T. 303). When the police arrested Petitioner 12 days after the robbery, Petitioner reportedly was riding

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[6](...continued)
the procedural issue presents complicated issues of state law and the merits of the question are easily resolvable against the petitioner, judicial economy warrants giving the merits question priority); Medley v. Runnels, supra, 506 F.3d at 870; Franklin v. Johnson, 290 F.3d 1223, 1229, 1232-33 (9th Cir. 2002); see also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.), cert. denied, 528 U.S. 846 (1999) ("judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated"). Moreover, the pleading defects underlying state court denials citing Swain can be cured in a renewed state petition, suggesting no procedural default. Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986).

Nor must the Court decide whether Petitioner has adequately exhausted this claim. Where the California Supreme Court denies a habeas petition with citations to Duvall or Swain, the denial can signify a failure to exhaust available state remedies. See Kim v. Villalobos, supra, 799 F.2d at 1319. Respondent concedes in the Supplemental Answer that Petitioner has exhausted his claims, and the Court finds that the facts as pleaded and presented to the California Supreme Court were pleaded with as much particularity as practicable to allow the Court to reach his claims. See Respondent's Lodgment 4. Finally, even if Respondent had asserted the claims were not exhausted, for the reasons discussed herein, the Court may reach and deny the merits of Petitioner's claim because it is "perfectly clear" Petitioner's ineffective assistance claim is not colorable. See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006).

a chrome bicycle (R.T. 25). Prior to the start of trial, the prosecution informed the trial court it intended to introduce the bicycle as evidence (R.T. 2). However, the bicycle was never introduced at trial. Duran was never shown a photograph of the bicycle or asked to identify Petitioner's bicycle as the one used by the robber (R.T. 318, 337).

Petitioner asserts his counsel was ineffective for failing to investigate the "whereabouts" of the bicycle. Petitioner claims that a police report from the day of the robbery reflected that Duran reported the assailant's bicycle to be a "baige [sic]" beach cruiser, and not a chrome bicycle like the one Petitioner was riding when he was arrested. See Reply, p. 1; Exhibit A to Supplemental Answer, p. A-14. No such report appears in the record. Petitioner also claims without any offer of proof that he asked his trial counsel to bring in the bicycle during trial, but was told that the police had discarded the bicycle. See Exhibit A to Supplemental Answer, p. A-14. Petitioner alleges that, had the bicycle been brought into the trial, the outcome of the trial somehow would have been different. Id. at pp. A-14 - A-15. Alternatively, Petitioner asserts counsel should have moved to suppress evidence that Petitioner was arrested on a bicycle, given the alleged unavailability of the bicycle at trial. See Reply, p. 1.

While defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," Strickland, 466 U.S. at 691, Petitioner has presented nothing to overcome the strong presumption that his

counsel made a reasonable decision that further investigation of the bicycle was unnecessary for Petitioner's defense. Williams v. Woodford, 384 U.S. at 610. The prosecution never argued that the bicycle with Petitioner at the time of his arrest was the same bicycle the perpetrator rode on the night of the robbery (R.T. 369-70). Rather, the prosecution simply pointed to the uncontroverted fact that Petitioner was "getting around on a bicycle" during June 2003 when the robbery occurred (R.T. 369).[7] Petitioner has failed to demonstrate that counsel's decision not to challenge the missing bicycle was outside the wide range of reasonable professional assistance. Strickland, 466 U.S. at 691 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

Assuming, arguendo, it was error for counsel not to investigate the bicycle or move to suppress evidence concerning Petitioner's arrest with a bicycle, Petitioner cannot demonstrate prejudice under Strickland. See Strickland, 466 U.S. at 687-90. Petitioner's unsupported allegations concerning any possible discrepancy between the bicycle Petitioner was riding when he was arrested and the perpetrator's bicycle do not undermine the Court's confidence in the outcome at trial. Even if Petitioner's counsel could have proven the bicycles were not the same, or otherwise persuaded the trial court to

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[7] Petitioner's father testified that Petitioner was not riding his own bicycle in June, but rather was riding one loaned by Petitioner's friend (R.T. 329-30). Petitioner's father confirmed that during June 2003 Petitioner was "getting around" on a bicycle "sometimes" (R.T. 330).

exclude evidence that Petitioner was arrested with a bicycle, there is no reasonable probability that the outcome of the trial would have been any different. As noted above, the case against Petitioner did not depend in any degree on whether the bicycle present at the time of arrest was the same bicycle present at the time of the robbery. Rather, the case against Petitioner depended on whether the jury believed Duran's identification of Petitioner and identification of the gun found on Petitioner.

Because Petitioner has failed to demonstrate that counsel's actions or omissions with respect to the bicycle were either unreasonable or prejudicial, this claim fails. See Strickland, 466 U.S. at 694.

2. Failure to Make "Critical" Objections

Petitioner alleges that his trial counsel was ineffective for failing to "make critical objections at a critical stage in trial" (Petition, Ground 1). Specifically, Petitioner complains counsel failed to object to the allegedly improper identification procedure which amounted to police "leading the witness." See id; Exhibit A to Supplemental Answer, pp. A-14 - A-16 (alleging Detective Davis was "leading" witness Duran). This complaint does not merit habeas relief.

This case turned largely on the reliability of Duran's identification of Petitioner as the robber. As summarized above, the prosecution introduced evidence that, a little over a month after the

robbery, Duran identified Petitioner's photograph from a 6-pack photo array as that of the robber (R.T. 310-12, 319, 322-33, 335). Duran also identified Petitioner at trial as the robber and, from a photograph, identified Petitioner's gun as the gun used in the robbery (R.T. 303, 305-06, 310, 333, 336). Petitioner contends that the circumstances surrounding the showing of the 6-pack array and photograph of the gun were improperly suggestive and that counsel was ineffective for failing to object to the identification evidence as allegedly tainted (Petition, Ground 1).[8] However, Petitioner has not shown that counsel's failure to object to the identification procedure was unreasonable.

It is well-established that evidence derived from a suggestive pretrial identification procedure may be inadmissible, if the challenged procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." See Simmons v. United States, 390 U.S. 377, 384 (1968); see also Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 198 (1972); People v. Cook, 40 Cal. 4th 1334, 1354-55, 58 Cal. Rptr. 3d 340 (Cal.), cert. denied, 128 S. Ct. 443, 169 L.Ed. 2d 309 (2007); People v. Cunningham, 25 Cal. 4th 926, 989-90, 108 Cal. Rptr. 2d 291, 25 P.2d 519 (2001), cert. denied, 534 U.S. 1141 (2002).

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[8] Petitioner appears to argue counsel should have moved to suppress Duran's identification of Petitioner's photograph from the photo array and Petitioner's gun from the photograph, as well as Duran's in-court identification of Petitioner at trial, as evidence assertedly derived from impermissibly suggestive identification procedures. See Reply, p. 2. The same legal standards govern both in-court and photographic identifications. See Manson v. Brathwaite, 432 U.S. 98, 106-07 n. 9 (1977); Neil v. Biggers, 409 U.S. 188, 198 (1972).

However, nothing about the challenged procedures was so impermissibly suggestive as to render the identifications inadmissible or otherwise objectionable.[9]

Assuming, arguendo, the police conduct prior to showing Duran the photo array and photograph of the gun was suggestive, and further assuming counsel was unreasonable in failing to object to the identification evidence, Petitioner has not demonstrated a reasonable probability that the court would have sustained any such objection,

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[9] Petitioner does not argue that the photographic array or the photograph of the gun were unduly suggestive in themselves. Nor does Petitioner argue that the investigating officer said or did anything to suggest that Duran identify a particular suspect in the photo array or that Duran identify the gun in the photograph as the gun used by his robber. Rather, Petitioner argues that the pretrial photo identification procedure was unduly suggestive based on Duran's testimony at trial that police told Duran Petitioner was arrested on a bicycle while carrying a gun and that the gun in the photograph shown to Petitioner for identification was similar to the gun the examining police officer was carrying (Reply, p. 2).

Duran testified that, before police showed Duran the photograph, the officer told Duran that he was going to show Duran "a gun similar to the one I have with me here" (R.T. 320). When asked to clarify what the officer said, Duran said the officer told Duran "to keep thinking or be conscious of the fact that [Duran] had to remember that it was the gun, if [Duran] saw it" (Id.). Duran also confirmed that he had been told at some point that Petitioner was arrested a couple weeks after the robbery with a gun on a bicycle (R.T. 321-22). However, there is no indication in the record whether Duran was told about Petitioner's arrest before being shown the photographic array for identification.

The investigating police officer denied having told Duran about Petitioner's arrest or having said anything concerning the photograph of the gun prior to the identification procedure, other than asking if Duran could identify the gun in the photograph as the one used in the robbery (R.T. 336, 338-39).

and hence has not shown Strickland prejudice. As discussed more fully in Section II below, evidence is admissible following a suggestive identification procedure where the identification is nevertheless reliable under the totality of the circumstances. See Manson v. Brathwaite, 432 U.S. at 111-14; Neil v. Biggers, 409 U.S. at 199-200; People v. Cunningham, 25 Cal. 4th at 989. Given the reliability of the identifications in Petitioner's case, the court would have overruled any objection and allowed the jury to assess the persuasiveness of the identifications. See Manson v. Brathwaite, 432 U.S. at 116 ("Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."); People v. Arias, 13 Cal. 4th 92, 170, 51 Cal. Rptr. 2d 770, 820, 913 P.2d 980 (1996), cert. denied, 520 U.S. 1251 (1997) (same).

Because Petitioner has failed to demonstrate that counsel's actions or omissions with respect to the identifications were either unreasonable or prejudicial, this claim fails. See Strickland, 466 U.S. at 694.

II. Petitioner is Not Entitled to Relief on His Due Process Claim.

Petitioner contends his due process rights were violated when the trial court admitted Duran's identification evidence, despite the allegedly suggestive pretrial identification procedures. See Petition, Grounds 2 and 3. Petitioner further contends he was denied a fair trial when the police allegedly discarded the bicycle taken from Petitioner at the time of Petitioner's arrest. See Petition,

Ground 3. Neither of these contentions merits relief.[10]

A. Admission of Identification Evidence Following the Allegedly Suggestive Identification Procedures

Due process protects against the admission of evidence derived from a suggestive pretrial identification. See Neil v. Biggers, 409 U.S. at 196. Due process, however, does not require the exclusion of an in-court identification where there has been an earlier suggestive identification procedure, if the identification itself is sufficiently reliable under the totality of the circumstances. See Manson v. Brathwaite, 432 U.S. at 111-14; United States v. Dring, 930 F.2d 687, 693 (9th Cir. 1991), cert. denied, 506 U.S. 836 (1992); People v. Ochoa, 19 Cal. 4th 353, 412, 79 Cal. Rptr. 2d 408, 966 P.2d 442 (1998), cert. denied, 528 U.S. 862 (1999). To establish that an allegedly suggestive identification violated due process, Petitioner must show: "(1) a pre-trial encounter is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification; and (2) the identification is not sufficiently reliable to outweigh the corrupting effects of the suggestive procedure." Van Pilon v. Reed, 799 F.2d 1332, 1338 (9th Cir. 1986) (citation omitted); see also Manson v. Brathwaite, 432 U.S. at 114; Neil v. Biggers, 409 U.S. at 198-201. "The bare fact that a confrontation was suggestive does not alone establish constitutional

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[10] Petitioner raised these claims in his handwritten brief filed in the California Court of Appeal as part of Petitioner's direct appeal. See Exhibit A to Supplemental Answer. The Court of Appeal denied these claims in a reasoned decision. See Exhibit C to Answer.

error. The confrontation must be *impermissibly or unduly* suggestive under the totality of the circumstances." Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 1995), cert. denied, 516 U.S. 1017 (1995) (emphasis added). Petitioner has not met his burden.

First, as discussed above, the pretrial identification procedures were not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Second, as discussed below, Duran's identification following the allegedly suggestive procedures was nonetheless reliable under the totality of the circumstances.

The factors to be considered in evaluating the reliability of an identification after a suggestive procedure include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. at 199-200; see also People v. Cook, 40 Cal. 4th at 1354; People v. Cunningham, 25 Cal. 4th at 989.

As summarized above, Duran's opportunity to view the robber was somewhat limited. The entire robbery took place in approximately three or four minutes (R.T. 323). Duran was not able to see the robber during the time he was told to lie face down (Id.). However,

Duran spoke with the robber, looked at the robber's face, and watched as the robber got close enough to put a gun to Duran's forehead (R.T. 304-05). Duran admitted he was scared, but also said he would never forget the face of the person who robbed him (R.T. 323-24). Duran observed his robber in medium light (R.T. 315-16). Under similar circumstances, courts have upheld identifications as reliable. See Manson v. Brathwaite, 432 U.S. at 114 (identification reliable where witness stood within two feet of defendant at door for two to three minutes; door opened twice and witness spoke with defendant in natural daylight); Coleman v. Alabama, 399 U.S. 1, 4-6 (1970) (identification from brief view on dark highway lit only by car headlights sufficiently reliable); United States v. Foppe, 993 F.2d 1444, 1450-51 (9th Cir.), cert. denied, 510 U.S. 1017 (1993) (identification reliable where, although witness saw robber only for a matter of seconds, she testified she could identify perpetrator if she ever saw him again); Denham v. Deeds, 954 F.2d 1501, 1504-05 (9th Cir. 1992) (opportunity to view at very close proximity during course of armed robbery made identification sufficiently reliable); United States v. Gregory, 891 F.2d 732, 734-35 (9th Cir. 1989) (identifications reliable where witnesses viewed robber at close range for approximately 30 seconds); United States v. Monks, 774 F.2d 945, 956-57 (9th Cir. 1985) (bank teller's identification reliable where teller dealt directly with robber from a distance of two feet for three to four minutes); United States v. Valenzuela, 722 F.2d 1431, 1432 (9th Cir. 1983) (same); but see United States v. Field, 625 F.2d 862, 868 (9th Cir. 1980) (finding identification unreliable because opportunity to view lasted "only a few seconds and from a distance of 20 feet").

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Additionally, Duran's description of the robber given to police on the night of the robbery was consistent with Petitioner's appearance. Duran described his robber as a male between the ages of 20 to 25, approximately two inches taller than Duran, weighing between 180 and 190 pounds, and speaking in both English and Spanish (R.T. 308-09, 319). Petitioner's father testified that Petitioner weighs 180 pounds, speaks both English and Spanish, and is 5'8" tall (R.T. 328-29). When Duran and Petitioner both stood at trial, Duran testified he was confident Petitioner was the person who robbed him (R.T. 310). The accuracy of Duran's description and his expression of confidence that Petitioner was his robber suggest Duran's identification was sufficiently reliable notwithstanding any suggestive identification procedures. See United States v. Duran-Orozco, 192 F.3d 1277, 1282 (9th Cir. 1999) (identification sufficiently reliable where witness' descriptions of defendants were "fairly, although not totally" accurate); United States v. Jones, 84 F.3d 1206, 1210 (9th Cir.), cert. denied, 519 U.S. 973 (1996) (identifications reliable where witness' descriptions were "accurate, and with the exception of variations in their estimates of the robber's height, their descriptions were consistent"); United States v. Monks, 774 F.2d at 956 (identifications reliable where bank tellers' descriptions of robber accurately described defendant's proximate age, nationality and hairstyle, although there were discrepancies regarding his attire); Simmons v. United States, 390 U.S. at 385 ("Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons.").

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Although Duran did not identify Petitioner as his robber until a month after the robbery, and did not identify the photograph of the gun until five months after the robbery, the lapse of time does not render Duran's identifications unreliable. See United States v. Jarrad, 754 F.2d 1451, 1455 (9th Cir.), cert. denied, 474 U.S. at 830 (1985) (in-court identification reliable where three weeks elapsed between crime and allegedly suggestive pretrial identification). Indeed, identifications have been deemed reliable despite the lapse of much longer periods of time between the crime and the identification. See, e.g., Neil v. Biggers, 409 U.S. at 201 (seven months); United States v. Montgomery, 150 F.3d 983, 993 (9th Cir.), cert. denied, 525 U.S. 917 (1998) and 525 U.S. 989 (1998) (one year); United States v. Matta-Ballesteros, 71 F.3d 754, 769-70 (9th Cir. 1995), amended, 98 F.3d 1110 (9th Cir. 1996), cert. denied, 519 U.S. 1118 (1997) (six years).

In sum, although Duran's opportunity to view his robber was somewhat limited, Duran was only a few feet away from his robber, spoke with him, and could see his robber clearly enough to give responding police a description of the robber consistent with Petitioner's appearance. The length of time between the crime and Duran's identification of Petitioner's photograph in the photo array was only a month and Duran was fairly certain of his identification both at trial and when shown the photo line-up. Under these circumstances, the admission of the identification evidence did not deny Petitioner due process.

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B. The Alleged Discarding of Petitioner's Bicycle

To the extent Petitioner claims a due process violation based on the alleged discarding of the bicycle from Petitioner's arrest, Petitioner's claim fails as a matter of law. The State's duty to preserve evidence is limited to "material" evidence, i.e., evidence: (1) whose exculpatory value was apparent before its destruction; and (2) is of such nature that the defendant cannot obtain comparable evidence from other sources. California v. Trombetta, 467 U.S. 479 (1984); United States v. Sherlock, 962 F.2d 1349, 1355 (9th Cir. 1989), cert. denied, 506 U.S. 958 (1992); United States v. Dring, 930 F.2d at 693-94 (Petitioner "must at least make 'a plausible showing that the [evidence] . . . would have been material and favorable to his defense, in ways not merely cumulative to [other evidence].'" (citation omitted)). Moreover, destruction of such evidence does not violate the constitution unless the evidence was destroyed in "bad faith." Arizona v. Youngblood, 488 U.S. 51, 58 (1988); United States v. Estrada, 453 F.3d 1208, 1212 (9th Cir. 2006), cert. denied, 127 S. Ct. 990, 166 L. Ed. 2d 748 (2007).

Here, Petitioner has not shown the bicycle possessed an apparent exculpatory value. In fact, the bicycle might very well have been *inculpatory*. Duran testified that the bicycle the assailant was riding had chrome and the bicycle with Petitioner at the time of his arrest was chrome (R.T. 25, 303).

Assuming, arguendo, the bicycle had an apparent exculpatory value, Petitioner has failed to present any evidence suggesting that

the police discarded the bicycle in bad faith.[11] "Even assuming that the officers were negligent, a negligent investigation does not violate [a defendant's] due process rights." Villafuerte v. Stewart, 111 F.3d 616, 625 (9th Cir. 1997), cert. denied, 522 U.S. 1079 (1998); see also United States v. Carreno, 363 F.3d 883, 888 (9th Cir. 2004), vacated and remanded on other grounds, 543 U.S. 1099 (2005) ("Sloppy work, albeit unbecoming, is not tantamount to bad faith."). Therefore, the alleged failure to preserve the bicycle did not violate due process.

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In sum, the Court of Appeal's rejection of Petitioner's due process claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

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[11] In fact, Petitioner has presented no reliable evidence that the police discarded the bicycle. As the California Court of Appeal noted:

> [T]he record contains nothing with respect to any 'discarding' of the bicycle on which appellant was arrested, and his claims concerning evidence tampering are therefore not properly before us.

See Exhibit C to Answer (citing People v. Merriam, 66 Cal.2d 390, 396-97 (1967) (noting that appellate court, in review of trial court judgment on direct appeal, is limited to consideration of matters contained in the trial record)); 28 U.S.C. 2254(e)(1).

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.